LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
AUG 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 451

JEFF FORT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

MARSHALL PATNER
122 S. Michigan Avenue
Chicago, Illinois 60603

KENNETH G. JOHNSON and
ROSS, HARDIES, O'KEEFE, BABCOCK,
McDUGALD & PARSONS
122 S. Michigan Avenue
Chicago, Illinois 60603

Attorneys for Petitioner

MIDWEST LAW PRINTING CO., 326 N. MICHIGAN, CHICAGO (0601). FINANCIAL 6-3968

INDEX

	PAGE
Opinion Below	2
The Record	2
Jurisdiction	2
Questions Presented	3
Statutes and Constitutional Provisions Involved	4
Statement	6
Reasons for Granting the Writ	12
The Resisting Arrest Statute Conflicts with the Fourth Amendment	12
The Illinois Resisting Statute Is Vague and Lacks Standards. In Addition, It Also Proscribes Conduct Protected by the Fourth Amendment	15
The Defendant Was Denied Due Process of Law When the Appellate Court Relied on Facts Not in the Record and Statutes Not Charged in Order to Sustain the Conviction	16
Conclusion	23
Appendix—(Opinion of the Illinois Appellate Court, First District)	1a-3a

List Of Authorities Cited

Cases:

City v. Williams, 45 Ill. App. 2d 327, 195 N.E. 2d 425 (1963) 12
Civil Service Commission v. Oratowski, 3 Ill. App. 2d 551, 123 N.E. 2d 146 (1954) 16
Olmstead v. U. S., 277 U.S. 438 (1927) 13
People v. Graf, 93 Ill. App. 2d 43, ... N.E. 2d ..... (1968) 15
People v. Rinehart, 81 Ill. App. 2d 125, 225 N.E. 2d 486 (1967) 14-15, 16
Townsend v. Burke, 334 U.S. 734 (1948) 16
U. S. v. Hall, 348 F. 2d 837, Cert. denied 382 U.S. 947 (1965) 12
Wright v. Georgia, 373 U.S. 284 (1963) 12
Wrightson v. U. S., 222 F. 2d 556 (1955) 12

Statutes:

Illinois Revised Statutes, (1965), Chapter 38:
§ 7-1 5
§ 7-5 (a) 4
§ 7-7 (a) 4
§ 31-1 ..... 4, 6. 7
§ 107-2 4

Constitutional Provisions:

United States Constitution:
Amendment IV 5
Amendment XIV 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

JEFF FORT,

Petitioner,

VS.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Illinois Appellate Court, First District, entered in this case on January 18, 1968. Leave to appeal was denied by the Illinois Supreme Court on May 29, 1968. No petition for rehearing was filed.

OPINION BELOW.

The judgment of the Illinois Appellate Court, First District, is reported at 91 Ill. App. 2d 212, 234 N.E. 2d 384, (1968), and is set out in full as an appendix to this petition. The order denying leave to appeal is not reported.

THE RECORD.

A certified copy of the record below has been filed in this Court.

JURISDICTION.

This petition is presented for review of the judgment of the Illinois Appellate Court, First District, entered on January 18, 1968. Leave to appeal was denied on May 29, 1968. The jurisdiction of this Court is invoked under 28 United States Code Section 1257.

QUESTIONS PRESENTED.

1. Whether an Illinois Criminal Statute on resisting an arrest violates the Fourth Amendment because:

   a. the statute requires a citizen to submit to the use of unnecessary force by the police without opportunity to defend his person, even if the arrest is illegal or the force excessive, so as to proscribe protected (to be "secure in [one's] person . . . from unreasonable . . . seizure") conduct; and

   b. the statute lacks standards both for the police and the citizen as to whether conduct is illegal, whether the citizen is protecting himself or is affirmatively preventing an arrest, and as applied, permits police to use force in response to mere words which fall short of threat or even indicate clearly a refusal to cooperate with the police.

2. Whether a Citizen of the United States is denied the due process of law, guaranteed by the Fourteenth Amendment, when a reviewing court relies on facts not in the record and a statute not charged, where such facts and the said statute are critical to sustain the conviction.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Illinois Revised Statutes, (1965), Chapter 38:

§ 107-2

"A peace officer may arrest a person when:

(c) He has reasonable grounds to believe that the person is committing or has committed an offense . . ."

§ 7-5 (a)

"A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest."

§ 31-1

"A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500.00 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both."

§ 7-7 (a)

"A person is not authorized to use force to resist an arrest which he knows is being made . . . by a peace officer . . . even if he believes that the arrest is unlawful and the arrest in fact is unlawful."

§ 7-1

"A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force . . ."

United States Constitution:

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Amendment XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

In this case the defendant was convicted in The Municipal Division of the Circuit Court of Cook County, Illinois, on January 10, 1967 of resisting arrest(*) although the record shows that there was no basis for the underlying charges against him, and the only basis for the "resisting" charge was that he uttered a swear word of incredulity when the Officer told him he was under arrest, and that he managed to push back after he was grabbed and before he was manacled by the police. At a bench trial, the underlying charges were summarily dismissed when no evidence was offered by the State, and the trial court found the defendant guilty of resisting (R. Tr. 25-26);

> "The Court: This case, here, gentlemen, is a pure example of what can happen. The original reasons for the police officers arriving on the scene was discharged.
>
> This is the foundation of the Complaint . . . to decide whether the original arrest is legal or not.
>
> In my opinion, on the basis of the evidence, the officers' testimony . . . there was a definite resisting of arrest by Fort after he was told he was under arrest.
>
> Finding of guilty on resisting, in regard to Fort."

and concluded (R. Tr. 27):

> "Counsel, I feel that the Court has been very fair to the defendant in many instances, but we would be

(*) Illinois Revised Statutes, 1965, Chapter 38, Section 31-1.

doing a disservice to the community in this case if this defendant could walk out of this court feeling he could strike an officer, whether the arrest is legal or not.

I do not think a police officer has to be struck in a fight to make an arrest, whether the arrest is legal or not.

I will sentence Mr. Fort to 30 days in The House of Correction."

The Illinois Appellate Court, however, decided that the arrest was legal, in order to sustain the conviction, then relied on Sections 7-5(a) and 7-7(a)(*) neither of which was charged, that the defendant had resisted reasonable force used by the arresting officer. Leave to appeal was denied by the Illinois Supreme Court on May 29, 1968 and the defendant asks review by this court. The full sequence of events appears in the record as follows:

On June 24, 1966, two Chicago Police Officers, Sullivan and Kovacs, assisting in an investigation of a complaint of a theft of a shotgun (R. Tr. 6) saw five boys on the porch of an apartment building on the southside of Chicago (R. Tr. 6). When Hairston, one of the boys, saw the policemen, he came downstairs and said (R. Tr. 6) "What's wrong?" Without any showing of a warrant, or any reason appearing to excuse a warrant, Officer Sullivan told him (R. Tr. 7) "We have a charge that you were involved in a theft." In response to Sullivan's request, the other four boys, George Rose, Lamar Bell, Leroy Dean and the Defendant (R. Tr. 4), came down the stairs, Sullivan told the boys (R. Tr. 8) that he had been given the names of the de-

(*) Illinois Revised Statutes, 1965, Chapter 38.

fendant and Hairston, called for the other car in the investigation and went up on the porch and found a shotgun. It was not loaded (R. Tr. 16).

Although the complaining witness was brought to the scene (R. Tr. 8), there was no attempt to determine that the gun was the witness's property. Instead, Hairston, Rose and the defendant were arrested for theft, but those charges were dropped as the complaining witness did not appear, even though the witness was available from almost adjacent to the place where the defendants were arrested (R. Tr. 3, 5-6) (R. Tr. 2, 4). And since it would have been necessary to appear to claim the gun, it is questionable at best, whether the gun belonged to the witness at all.

The Officer testified (R. Tr. 9-10) that the gun was not in the possession of any of the boys, yet on this record the police charged defendant, and the four other boys, with "unlawful use of weapon." Later those charges were dismissed without objection by the State;

Officer Sullivan testified (R. Tr. 8):

". . . I then came downstairs and I stated that they were under arrest.

"Q. All right.

"A. At this time Mr. Fort stated 'Bullshit,' and I grabbed him, and he pushed me, and hit me, . . .

"Q. Were you struck by defendant Fort?

"A. In the shoulder, and it glanced off of my face."

Officer Kovacs testified (R. Tr. 16):

"Q. Who did you attempt to arrest here?

"A. When the struggle ensued after Officer Sullivan took hold of Jeff Fort, I came to his assistance and for our protection I attempted to put handcuffs on Jeff Fort to restrain him.

". . . I grabbed hold of George Rose and told him that he (R. Tr. 17) is under arrest, and he resisted by pushing back from me and we were going to handcuff him to subdue him.

"Q. You were going to handcuff him to subdue him. All right.

"A. Though I was struck from—it seemed like from behind, a glancing blow or a bump up against me. I turned around, and Eugene Hairston was there, and I took hold of him also and thus asking for a pair of handcuffs from one of the officers at the scene to handcuff him.

"Q. That was the basis of the charges against the others?

"A. Yes, resisting."

On these facts, Bell, Hairston, and defendant were charged with disorderly conduct (R. Tr. 2, 4) and Hairston, Rose, and defendant with resisting arrest (R. Tr. 2, 4). At the close of the evidence the trial court (R. Tr. 25) granted a motion to dismiss the disorderly conduct charges against all of the defendants and the Court said (R. Tr. 24):

> "As far as the evidence presented, from what the officers testified, would not find any of these four gentlemen guilty of resisting. The only individual where there was a question of resisting was Fort, from the testimony of Officer Sullivan."

In a hearing to set punishment, all that the State had to introduce against (R. Tr. 26) the defendant was an arrest record with no convictions:

"[The prosecutor]. Difficulty goes a long way back, Judge, the difficulties this man has had with the law.

"Strong arm robbery, was discharged.

"Reckless conduct. S.O.L. [Stricken with leave to reinstate].

"And a burglary that does not state what the rulings were, and an aggravated battery here.

"The other aggravating circumstances are inherent in the case itself, where the defendant did not submit to the authority of the police."

On this record, and although it is common knowledge that a simple resisting arrest conviction ordinarily rates a twenty-five dollar fine, the trial court sentenced defendant to serve thirty days in jail, and although the ordinary bond for a thirty day sentence is $500 to $1,000, the Appeal Bond in this case was set (R. Tr. 28) at $10,000.00.

In order to sustain the conviction, the Appellate Court found it necessary to embellish the facts and to rely on two sections of the Illinois Statutes not charged in the Complaint. (The Complaint appears at R. 3). The reviewing court "found" that the gun was stolen (App. 2a and 3a), to add some onus on the defendant; that the arrest occurred in a "tense situation" (App. 3a) and defendant's response was "abusive and defiant" (App. 3a). There was no showing that the defendants had an opportunity to or were even asked to get into the squad car peacefully, without being grabbed, that there was any tension until after the arrest, or that defendant's remark was or was understood by the police officers to be "abusive and defiant," and there was no showing either that the exclamation was anything but disbelief, or that the officers thought otherwise. And the Appellate Court found it necessary both to find that the arrest was legal and the force used justified, re-

lying on Sections 7-5(a) and 7-7(a) of Chapter 38 of the Illinois Revised Statutes. The Appellate Court affirmed and the Illinois Supreme Court denied leave to appeal.

Defendant asks this Court to grant review to determine whether the police had cause to grab the defendant, whether his verbal response gave them cause to physically seize him, whether he was entitled to respond in the limited way that he did, and finally, whether any standards exist as to resisting or self protection, under the Illinois Statute. Defendant also asks for review to determine whether it was proper for the Appellate Court to rely on facts not in the Record, and statutes not charged.

IMPORTANT CONSTITUTIONAL QUESTIONS INVOLVED AND CONFLICT WITH DECISIONS OF THIS COURT.

The Resisting Arrest Statute Conflicts with the Fourth Amendment.

This case raises the question of whether a criminal statute can prohibit a citizen from protecting his person from an illegal arrest or from the excessive or unnecessary force used by a police officer. This Court has not determined this question and it is raised squarely in this case.

The Fourth and Fourteenth Amendments to the United States Constitution protect the individual against unreasonable arrest. *United States* v. *Hall,* 348 F. 2d 837, Cert. denied 382 U.S. 947 (1965), *Wrightson* v. *United States,* 222 F. 2d 556 (1955), and in *Wright* v. *Georgia,* 373 U.S. 284, 292 (1963), this Court stated that there is no obligation to obey an unlawful police order and Illinois has said, *City* v. *Williams,* 45 Ill. App. 2d 327, 330-331, 195 N.E. 2d 425 (1963), "[There is] no obligation to obey . . . a police order if it is arbitrary and unreasonable." An illegal order does not become valid because it involved physically seizing a person, rather than verbally ordering him about. In this case, the police seized the defendant's person without even making any minimal efforts to confirm the validity of the complaint or to effect the arrest peacefully. There is nothing in the record to show that the force used was necessary or that force was even required. The only evidence indicates that the boys had cooperated and peacefully followed a police request to come off of the porch without any necessity for doing so. Thereafter, the

police officer announced indiscriminately that the whole group was under arrest, but he did not say what for. This was done even though there was never any suggestion of any participation in anything illegal by at least two of the boys. Why were all of the boys summarily placed under arrest?

The record shows that the police, before establishing any basis to do so, used physical force to take the defendant into custody. Yet the defendant's only action in response was a swear word of incredulity, and when grabbed, to push back once at the officer.

But trial judge believed that the Illinois Statute prohibits resistance to any kind of arrest, and that a citizen can be convicted under Section 31-1 whether the arrest is legal or illegal. If a citizen may not resist, may the police use unnecessary force? If they do, isn't it the police who are acting illegally? Justice Brandeis, dissenting in *Olmstead* v. *United States,* (1928), 277 U.S. 438, 485, 48 S. Ct. 564, 575 said:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Yet the trial court would have a defendant submit under any facts or circumstances. What is the effect of such a rule of law? Mayor John V. Lindsay in an address to the Lawyers Committee for Civil Rights under Law on May 20, 1968 stated:

"The continuing tragedy in our cities is that the administration of criminal justice is not working satisfactorily on a daily basis. Under entirely normal circumstances, the system dispenses mass justice and fails to deal properly with the individual. Yet in these same courts, hundreds of thousands of our less fortunate citizens first confront their government and first experience the application of that government's laws to them."

One step closer to the people are the police. Many hundred. of thousands of citizens first come into contact with their government through the police officers. The conduct and actions of the police in their day to day contacts with the people and their treatment of the people as individuals largely determines those citizens attitude toward law and order.

If the police use unnecessary or illegal force in dealing with people, the people will lose respect for law and order and violence becomes inevitable. The example of respect and peacefulness must just be set in the public sector.

Is it asking too much to ask the police to take certain minimal threshhold steps to determine the reasonableness of the arrest and the necessity for the use of force? Certainly force can and should be used when necessary, but this case is a classic example of what can happen when the police are quick to accuse and quick to use force. If the police had made a reasonable effort to determine the ownership of the gun, used force only if the defendant actually refused an order to come along peacefully and treated the defendant with the same respect persons of higher standing in the community are treated (See *People* v. *Rinehart*, (1967), 81 Ill. App. 2d 125, 225 N.E. 2d 486), most of the

trouble in this case could have been forestalled. The Illinois Resisting Statute denies citizens the right to be "secure in their person . . . from unreasonable . . . seizure."

The Illinois Resisting Statute Is Vague and Lacks Standards. In Addition, It Also Proscribes Conduct Protected by the Fourth Amendment.

The vagueness of the Illinois Resisting Statute is classically demonstrated in this case. First, because the trial judge convicted the Defendant under the resisting arrest Statute (Section 31-1) without regard to whether the police conduct was legal or not. Second, because the Illinois Appellate Court in order to justify the conviction under Section 31-1 found it necessary to expand that Section to include two other statutes, Section 7-5(a) and 7-7(a)(*) and found it necessary to misstate the facts, so as to add tension as a new element, as though existence of tension would have justified grabbing the defendant in this case. Third, because the trial court found defendant guilty, but at the same time on similar evidence did not find Rose and Hairston guilty. Fourth, because the only distinction between the facts as to this defendant and as to Rose and Hairston was that defendant spoke. Does the resisting arrest statute prohibit speaking? When does verbalizing become resisting? Was the defendant's remark "abusive and defiant," disbelief, or what? There is no showing what the tryer of fact found. In Illinois even foul swearing

(*) These Sections are each a nullity under Illinois law for failure to include a penalty, *People* v. *Graf*, 93 Ill. App. 2d 43, ... N.E. 2d ..... (1968).

is no cause for police action. *Civil Service Commission* v. *Oratowski,* 3 Ill. App. 2d 551, (1954). And can words be resistance when actual refusal to go with the police officer is not *People* v. *Rinehart,* 81 Ill. App. 2d 125, 225 N.E. 2d 486 (1967) (same court)? Is resistance an affirmative act? Is some threshhold effort to arrest without force required before a police officer can resort to force, particulaly when no overt acts other than words on the part of defendant are involved?

A police officer may not use force except to effect a legal arrest and then he may only use such force as is reasonably necessary to effect the arrest or protect his person. He has no power to use force when making an illegal arrest. However, a citizen cannot resist an illegal arrest. (Section 7-7(a)). When the police officer uses force without cause, or excessive force, what is the citizen to do? How shall he respond? The Appellate Court would agree with the prosecutor: "submit" to police authority. What if it hurts? If the citizen cannot use force in return, can he defend himself or ward off blows? New restrictions in personal freedom under "stop and frisk" do not extend to absolute submission, or to submission to force. The Illinois Resisting Statute is vague and unconstitutional and violates the Fourth Amendment.

The Defendant Was Denied Due Process of Law When the Appellate Court Relied on Facts Not in the Record and Statutes Not Charged in Order to Sustain the Conviction.

A trial judge cannot convict a man on the basis of assumptions which are materially untrue, *Townsend* v. *Burke,* 334 U.S. 736 (1948), accordingly, a reviewing court of necessity must be limited to facts in the record. Any assumptions of fact not in the record would

deprive the defendant and the prosecution of their rights to cross examine, redirect, and put on additional witnesses to prove or disprove such assumptions. These rights are basic and fundamental to due process.

There was a material denial of due process in the instant case because the Illinois Reviewing Courts in order to sustain the conviction of defendant by the trial judge relied on facts not in the record and two statutes not charged.

The only question passed upon by the Illinois reviewing courts was whether the force used by the police officers was necessary because they assumed without discussion that the arrest was lawful. The officers did not have a warrant, therefore the issue of the legality of the arrest and the necessity for force are both issues, particularly when the trial judge said he was finding defendant guilty of resisting arrest whether or not the arrest was legal or illegal (R. Tr. 27).

In the Appellate Court's statement of fact (App. 2a) the Court asserts that Officer Sullivan "found the stolen shotgun" when in fact he found a shotgun, and there is no evidence in the record at all to show that the gun found was stolen. In fact, the theft charge was dismissed without argument by the prosecution.

Although the complaining witness was brought to the scene (R. Tr. 8), there was no attempt to determine the ownership of the gun. Instead, Hairston, Rose and the defendant were charged with theft, but those charges were dropped because the complaining witness did not appear even though the witness was available from al-

most adjacent to the place where the defendants were arrested (R. Tr. 3, 5-6), (R. Tr. 2, 4). Since it would have been necessary for the complaining witness to appear to claim the gun, it is questionable at best, whether the gun belonged to the witness at all.

Misstating the record to the effect that the officers found the "stolen shotgun" eliminated the need to determine if the arrest was legal because a Police Officer who finds a stolen shotgun in a person's possession probably has sufficient grounds to arrest that person. However, even if the arrest was legal the defendant still had to know he was being arrested before he could resist. The Illinois Reviewing Courts assumed that he knew he was under arrest and summarily ignored that problem by stating "It is not necessary that the exact sequence of events be conclusively established in order to determine whether the defendant was guilty of resisting arrest." (App. 2a-3a).

The Illinois Reviewing Courts having assumed a legal arrest and resistance only considered whether or not the force used by the police officers was necessary and reasonable, concluding that it was for the following reasons:

1. *The police officers had located a stolen shotgun.*

This reason is materially false, there being no proof in the record that the shotgun was stolen, the theft charge being dismissed without argument by the prosecution.

2. *The arrest occurred in a tense situation.*

This reason was not proved by the record. There is no evidence of tension in the record, it was assumed by the Illinois Reviewing Courts from essentially the same facts used to show that force was necessary. Four armed policemen were trying to arrest five unarmed boys,

ordinarily, this is a very favorable situation for the policemen and nothing in the record changes the ordinary. There is no basis to say that tension was caused by the defendant and not by the police, or that if there was tension that gave cause to the police officer to grab the defendant.

3. *Defendant responded with his abusive and defiant remark, which unquestionably aggravated tension and gave police cause to believe force was necessary.*

This reason is also materially false. Officer Sullivan testified (R. Tr. 8):

> ". . . I then came downstairs and I stated that they were under arrest.
>
> "Q. All right.
>
> "A. At this time Mr. Fort stated 'Bullshit,' and I grabbed him, and he pushed me, and hit me, . . .
>
> "Q. Were you struck by defendant Fort?
>
> "A. In the shoulder, and it glanced off my face."

Officer Kovacs testified (R. Tr. 16):

> "Q. Who did you attempt to arrest here?
>
> "A. When the struggle ensued after Officer Sullivan took hold of Jeff Fort, I came to his assistance and for our protection I attempted to put handcuffs on Jeff Fort to restrain him.
>
> ". . . I grabbed hold of George Ros and told him that he (R. Tr. 17) is under arrest, and he resisted by pushing back from me and we were going to handcuff him to subdue him.
>
> "Q. You were going to handcuff him to subdue him. All right.
>
> "A. Though I was struck from . . . it seemed like from behind, a glancing blow or a bump up

against me, I turned around, and Eugene Hairston was there, and I took hold of him also and thus asking for a pair of handcuffs from one of the officers at the scene to handcuff him.

"Q. That was the basis of the charges against the others?

"A. Yes, resisting."

The Illinois Reviewing Courts say the word "Bullshit" is slang, vulgar and has a contemptuous meaning, (App. 2a) citing Webster as authority. There is no evidence to support this and Webster's gives other preferred meanings. With all due respect to the Illinois Courts' understanding of human nature and vocabulary, this word in its ordinary usage simply does not have the connotation suggested. In the language of the streets it is equivalent to saying "nonsense" or "that's not true" or "you must be kidding" or "you're putting me on." More sophisticated synonyms are "Bull" and "Horsefeathers." It is not uncommon even in polite society to talk of one "shooting the bull." In the local atmosphere of a Negro slum the word "bullshit" has become a very common utilitarian word used by many people to express disbelief and denial.

Did the word "bullshit" aggravate tension? If so, why? A citizen of the United States has every right to be incredulous when a police officer comes and accuses him of a crime, a crime which he apparently did not commit. Police officers have no right to expect otherwise. Citizens may not resist arrest, but no law prohibits their denying their guilt lest it aggravate tension. In addition, the defendant testified that Officer Sullivan responded to his denial of knowledge of a shotgun by saying "don't give

me that bullshit" (R. Tr. 22). Obviously, the word is quite common in its usage and would not and should not have added to tension.

If the police officer became angry that anyone should have the nerve to dispute his arrest assertion, his anger is not justified and any increase in tension caused by the police officer's anger is not the defendant's fault. No one familiar with the language of the streets, as these officers undoubtedly were could reasonably believe that a statement of disbelief evidences an intent to resist arrest and therefore necessitates the grabbing and manacling of the defendant. The record is completely silent with respect to any other evidence that force was necessary. The police officer never asked the defendant to come to the station or the car, nor did the defendant ever refuse. The evidence of the police officer, taken as being true is that when defendant was told he was under arrest he said "Bullshit" and Officer Sullivan grabbed him and manacled him, but these facts do not support the court's assumption.

4. *Struggling and fighting ensued and four officers were required to restore order.*

The Illinois Courts were correct that struggling did ensue at some point during the investigation and arrest, but the record is quite ambiguous and contradictory as to when, what and how much happened. A reasonable interpretation is that defendant was protecting himself from an angry police officer, but even if struggling did ensue, what relevance has this to the question of the necessity for the original use of force? The question the court was answering was not whether force was used, it

admittedly was, but whether the force used was necessary to effect the arrest. If the force used was not necessary to effect the arrest, defendant cannot be found guilty of resisting, therefore the fact that fighting ensued is not a reason for an opinion that the force used was necessary.

Moreover, the Illinois Courts stated that four officers were required to restore order. Again a material misstatement of fact designed to show more trouble than there really was. The record is very clear that two of the officers remained away from the struggle. It can be assumed that they did not believe their help was needed. The Illinois Reviewing Courts erroneously and improperly misstated the facts in order to buttress an opinion that was already predicated on improper grounds.

5. *Anyway a citizen is not allowed to struggle.* (C. 38, 7-7(a), Ill. Rev. Stats. 1965).

The Illinois reviewing court's last reason is also irrelevant besides being a statute not charged. Section 7-7(a) of Chapter 38 of the Illinois Revised Statutes, on its face, prohibits citizens from resisting any kind of arrest. However, the statute does not give Police Officers the right to use unnecessary force. Once again, if the force used was not necessary, the defendant could not be guilty of resisting arrest.

None of the reasons stated by the Illinois Reviewing Courts support their conclusion that the force used to arrest the defendant was necessary.

The conviction therefore rests on facts not in the record and on a statute not charged, and the defendant was denied due process.

CONCLUSION.

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted

MARSHALL PATNER
122 S. Michigan Avenue
Chicago, Illinois 60603

KENNETH G. JOHNSON and
ROSS, HARDIES, O'KEEFE, BABCOCK,
McDUGALD & PARSONS
122 S. Michigan Avenue
Chicago, Illinois 60603

Attorneys for Petitioner

APPENDIX

Opinion of the Illinois Appellate Court, First District, reported at 91 Ill. App. 2d 212 (1968).

January 18, 1968.

Obstructing Justice, § 1(*)—defense of right to defend against officer.

Where burglary suspect used slang and vulgar word having contemptuous and defiant connotation when police officers stated that he and four youthful companions were under arrest, and youths were then milling around officers, making it seem they were trying to take defendant from custody, reasonable cause to believe that force was required to maintain custody existed, and accused, who was subdued, was not entitled to defend charge of resisting or obstructing police officer on ground he was justified in defending himself (Ill. Rev. Stats. 1965, c. 38, § 7-5(a)).

Appeal from the Circuit Court of Cook County, Municipal Division; the Hon. HARRY G. COMERFORD, Judge, presiding. Judgment affirmed.

Marshall Patner and Alfred R. Lipton, of Chicago, for appellant.

John J. Stamos, State's Attorney of Cook County, of Chicago (Elmer C. Kissane and Barth H. Goldberg, Assistant State's Attorneys, of counsel), for appellee.

MR. JUSTICE SCHWARTZ delivered the opinion of the court.

The defendant was charged with the crime of resisting or obstructing a peace officer (Ill. Rev. Stats., c. 38, § 31-1 (1965)) and after a trial by the court he was found guilty and sentenced to serve thirty days in the House of Correction. He appeals and contends that the testimony of the arresting officer should be disregarded as self-

* See Callaghan's Illinois Digest, same topic and section number.

contradictory and that in any event he (the defendant) was justified in defending himself. The facts follow.

On June 24, 1966, Officers Sullivan and Kovacs of the Chicago Police Department were assigned to investigate the theft of a shotgun from 1422 East 67th Street, Chicago. After speaking to the victim, they set out to find Jeff Fort and one Gene Hairston who were allegedly involved in the theft. They found Fort, Hairston and three other youths sitting on a front porch at 1404 East Marquette Road, Chicago. They stopped their car in front of the building and were met by Hairston. They told him that they had a charge against him of involvement in the theft. Officer Sullivan directed the other men on the porch to come downstairs and when they did so, he told them of the nature of the investigation. Sullivan went upstairs, where the five young men had been, and found the stolen shotgun. He came down and informed all five men that they were under arrest. To this, the defendant replied, "Bullshit." That word, slang and vulgar, has a contemptuous and defiant connotation. (See Webster's Third New International Dictionary, unabridged, 1964.) The youths were milling around the officers when the defendant directed that abusive, defiant remark to Officer Sullivan. Officer Kovacs testified that it seemed to him they were trying to take Jeff Fort from custody. Sullivan grabbed the defendant, who pushed and struck him. Kovacs testified that he saw the defendant thrashing and kicking and swinging his arms and that he was subdued by Officer Sullivan only with his aid and the aid of two other officers who had been summoned to the scene.

Defendant argues that the police officer was not justified in grabbing him; that the officer's actions amounted to an unprovoked attack; and that under the circumstances he was privileged to repel the attack. In furtherance of this argument he emphasizes some contradictions in the testimony of Officer Sullivan, particularly as to whether the officer seized the defendant before or after being struck by him. It is not necessary that the exact

sequence of events be conclusively established in order to determine whether the defendant was guilty of resisting arrest. He admits struggling with the police, and we need only determine whether his physical resistance was in response to an unreasonable exercise of force by the officers.

The Criminal Code provides that:

> "A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest." (Ill. Rev. Stats., c. 38, § 7-5 (a) (1965).)

The arrest occurred in a tense situation. The officers had located a stolen shotgun and undertook to arrest five young men for the offense, when the defendant responded with his abusive and defiant remark. This unquestionably aggravated the tension and gave the police reasonable cause to believe that force was required to maintain custody of the defendant. Struggling and fighting ensued and four officers were required to restore order.

Arrests frequently are made under hazardous conditions and the peace is best preserved when the citizen submits to arrest without regard to the merits of the case. (See, c. 38, § 7-7 Ill. Rev. Stats., (1965).) Our courts have gone to great length to preserve the individual's right to an impartial trial and trial by combat has long been outlawed.

The defendant was proven guilty beyond a reasonable doubt and the conviction is affirmed.

Judgment affirmed.

DEMPSEY, P. J. and SULLIVAN, J., concur.